Op. Atty. Gen. 458. The latter case is interesting, as the judges who imposed the sentence seem to have signed the petition for pardon, thus indicating that they believed that the committment was a criminal sentence and so could only be remitted by the President. Criminal contempts of court are generally treated and punished by the States as crimes. It has been held that the Governor can pardon them in *ex parte Hickey* (Miss. 1845) 4 Sm. & M. 751; *State* v. *Sauvinet* (1872) 24 La. Ann. 119; *Sharp* v. *State* (1899) 102 Tenn. 9. Such a contempt was pardoned in New York by Governor Hill in 1891. Pub. Papers of Gov. D. B. Hill, 1891, p. 270. The opposite view was taken in *Taylor* v. *Goodrich* (Tex. Civ. Ap., 1897) 40 S. W. 515.

In holding that, whatever the rule as to criminal contempts, civil contempts are not to be treated as offences against the United States and so cannot be pardoned, the principal case seems sound. It is true, this distinction, now recognized in England, has not yet been drawn by the Supreme Court. It has, however, as yet had no occasion to draw it. There is some contrary authority. Attorney-General Crittenden advised the President that he could pardon contempt in the non-payment of a fine to a private party *Drayton and Sears Case*, (1852) 5 Op. Atty. Gen. 572. In a similar case Judge BLATCHFORD refused to alter orders of commitment, holding that as the offense was criminal, the President only could grant relief. *In re Mullee* (1869) 7 Blatch. 23; *Fischer* v. *Hayes* (1879) 6 Fed. 63, but later abandoned his position by admitting the defendant to bail. *Fischer* v. *Hayes* (1881) 7 Fed. 96. Several cases in the Circuit Courts intimate that under Rev. St. § 725 defining the power of the courts to punish for contempt, the contempt process cannot be used merely as civil remedy, but must be primarily punitive in purpose and character. *U. S.* v. *Atch. T. & S. F. R. R.* (C. C. Col. 1883) 16 Fed. 853; *Searles* v. *Worden* (C. C. E. Mich. 1882) 13 Fed. 717. This is a possible interpretation of the Statute, but narrows unwarrantably the use of the contempt process. The better view is taken by *Hendryx* v. *Fitzpatrick* (C. C. Mass. 1884) 19 Fed. 810 which holds that the contempt process can be used as a remedy to secure private rights and when so used the commitment is not to be treated as a sentence for a criminal offence, but as a civil remedy. That a civil contempt cannot be pardoned follows logically from this. There is a dictum in *State* v. *Sauvinet, supra* that a Governor cannot pardon such a contempt. The distinction between civil and criminal contempts has frequently been recognized in other State courts, but the question of the power of the Governor to pardon the former has not been raised. In the present development of the law it would certainly seem remarkable to hold that the President or a Governor could practically deprive a party to a suit of his rights, by rendering ineffective the well-recognized remedy of the contempt process. Such a result is not justified by the fact that this process is also used to punish crimes and that the peculiar circumstances of its origin impressed on it the form of a vindication of public authority.

EQUITY JURISDICTION OF A FEDERAL COURT TO SET ASIDE A WILL BY FORCE OF A STATE STATUTE.—State Statutes upon which the effort

has been made to obtain equitable action by the Federal Courts, there being the requisite diversity of citizenship, have mainly been of two classes. (1.) Where the enactment gave mere contract creditors rights in equity against the debtor's property. Inferior Federal Courts have sometimes taken jurisdiction in such cases. *Fechheimer* v. *Baum* (1889) 37 Fed. 167. But adjudications by the Supreme Court in recent years have established a contrary rule beyond dispute. *Scott* v. *Neely* (1890) 140 U. S. 106. The Court, *per* FIELD, J., at page 109, say: "The general proposition, as to the enforcement in Federal Courts of new equitable rights created by the States, is undoubtedly correct, subject, however, to this qualification, that such enforcement does not impair any right conferred, or conflict with any inhibition imposed, by the Constitution or laws of the United States." The case was held within this qualification as violating the provision for separation of law and equity in Federal courts and infringing upon the right of trial by jury in cases at law. (2.) Where the enactment gave parties not in possession rights in equity to quiet title. Under such a statute the Supreme Court has sanctioned the taking of jurisdiction where neither party was in possession, *Holland* v. *Challen* (1883) 110 U. S. 15, but refused to do so where the defendant was seized. *Whitehead* v. *Shattuck* (1890) 138 U. S. 146. The test imposed in each case was whether, by allowing action under the statute "controversies properly cognizable in a court of law will be drawn into a court of equity." *Holland* v. *Challen, supra,* at page 25. These cases establish the three exceptions to the general rule that a State statute enlarging equitable remedies will be enforced in a Federal court where there are the necessary elements of Federal jurisdiction, as follows: where enforcement would (1) conflict with the distinction, strictly observed in the United States courts, between law and equity, or (2) contravene R. S. § 723 providing that suits in equity shall not be entertained where there is an adequate remedy at law, or (3) violate the constitutional right to trial by jury in actions at law. *Adone* v. *Strahan* (1899) 97 Fed. 691. They disclose the inaccuracy of the glibly quoted statement: "A party, by going into a national court, does not lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality." *Cowley* v. *Railroad Co.* (1895) 159 U. S. 569 at p 583.

The inferior courts have lately been called upon in two instances to exercise jurisdiction under State statutes enabling equity courts to set aside the probate of wills for fraud or duress. Each court granted the demand. *Williams* v. *Crabb* (C. C. A. 7th. Cir. 1902) 117 Fed. 193; *Wart* v. *Wart* (C. C. N. D. Ia. 1902) 117 Fed. 766. A like result was reached in *Richardson* v. *Green* (C. C. A. 9th. Cir. 1894) 61 Fed. 423, an application to review which was denied. *Richardson* v. *Green* (1894) 159 U. S. 264. The Supreme Court has never passed directly upon the point. If the remedy provided by these statutes violates any of the three qualifications pointed out, it would seem that the three decisions in question are unsound. It has long been an established rule that equity has no inherent power to revoke the probate of a will. *Allen* v. *M'Pherson* (1847) 1 H. L. Cas. 191; *Broderick's Will* (1874) 21 Wall. 503. The reason for this is that, theoretically, there is an adequate remedy at law and in the probate

courts. But these courts are entirely creations of the legislature which may alter their jurisdiction as it sees fit. The fact that it has given to an equity court jurisdiction to set aside a will would seem at least *prima facie* evidence that there is no adequate remedy otherwise. Nor does the Supreme Court view its equitable jurisdiction illiberally. "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would afford under the same circumstances." *Kilbourn* v. *Sunderland* (1888) 130 U. S. 505, at p. 514. The fact that legal questions are also involved does not oust the court of jurisdiction if the remedy at law falls short of this. *Gormley* v. *Clark* (1889) 134 U. S. 338, at p. 349. These considerations lead to the conclusion that the Supreme Court would sustain the decisions in question. Its opinions contain dicta to that effect. *Gaines* v. *Fuentes* (1875) 92 U. S. 10, at p. 21. This case held that where an equitable action to annul a will would lie in the State courts it would be removable to the Federal courts, the requisites of Federal jurisdiction being present; not that an original bill would lie. Another dictum is in *Ellis* v. *Davis* (1883) 109 U. S. 485, at p. 496. Furthermore, dissents have always been in favor of such assumptions of jurisdiction. BROWN, J., dissenting in *Cates* v. *Allen* (1892) 149 U. S. 451, at p. 462, says: "I had always supposed it to be a cardinal rule of Federal jurisprudence that the Federal courts are competent to administer any State statute investing parties with a substantial right." In fact, of the present Supreme Court, besides BROWN, J., there are committed in favor of the jurisdiction, MCKENNA, J., *per* concurring opinion in *Richardson* v. *Green*, *supra*, and FULLER, Ch. J., *semble*, *per* opinion of court in *Gormley* v. *Clark*, *supra*. Nowhere, apparently, has it been noticed that this result is somewhat inconsistent with the two rules already pointed out, to which the Supreme Court is committed, that equity will not set aside the probate of a will, because there is an adequate remedy at law, and that a State statute enlarging equitable jurisdiction will not be available in Federal courts if there is such adequate remedy.

INJURIES RECEIVED WHILE OFF DUTY BY REASON OF THE NEGLIGENCE OF A FELLOW SERVANT. The theory on which the rule is based which exempts a master from liability when one of his servants is injured by the negligence of a fellow servant, is, as stated by ERLE, C. J., in *Tunney* v. *Midland R. Co.* (1866) L. R. 1 C. P. at p. 296: "A servant, when he engages to serve a master, undertakes, as between himself and his master, to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant, when he is acting in the discharge of his duty as servant of him who is the common master of both." This theory was first advanced by SHAW, J., in *Farwell* v. *B. & W. Ry. Corp.* (1842) 4 Met. 49, and it has been generally adopted both in England and in this country, in preference to that of *Priestly* v. *Fowler* (1837) 3 M. & W. 1, "that a servant has better opportunities than his master of watching and controlling the conduct of his fellow-servants, and that a contrary doctrine would lead to intolerable inconvenience, and encourage servants to be negligent." Pollock on Torts p. 84. To apply this rule there